Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1220

EDWIN GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Edwin Garcia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on January 2, 1980.

A. THE OPINION BELOW

There was no opinion by the trial judge. The opinion of the Court of Appeals filed January 2, 1980, affirming the judgment of conviction of the petitioner, Edwin Garcia, is printed herein as Appendix A. The defendant is currently on bail. A request for a stay of the mandate was

submitted to the United States Court of Appeals and denied on January 24, 1980. A simultaneous petition for bail pending determination by this court will be filed.

B. JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1980. Petitioner Edwin Garcia is still enlarged on bail and the jurisdiction of this court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of appeals for the Second Circuit.

C. QUESTIONS PRESENTED

1. Was Garcia's right to a fair trial violated when the United States Attorney stated in summation that "Garcia failed to present any evidence?"

2. Does the conspiracy end at the arrest of the petitioner?

3. Does possession of a licensed gun and large amounts of cash make one guilty of a narcotics conspiracy?

4. Are the "inferences" as enumerated above constitutionally permissible?

5. Is the driver of a car constitutionally liable for contraband found after an arrest on the passenger side of the car?

D. UNITED STATES CONSTITUTION AND THE STATUTES

United States Code, Title 21, Sections 812, 841(a)(1), 841(b)(1)(B) and 846.

E. SUMMARY STATEMENT OF MATTERS INVOLVED

The above petitioner-appellant, along with Donald McDermott and others, was arrested on April 19, 1979, within the Southern District of New York. At the time of the petitioner's arrest, he was driving his Lincoln automobile in the vicinity of 149th Street and Southern Boulevard, Bronx, New York. This was in the vicinity of the E & J Vending Company, which was owned by the petitioner. A passenger in petitioner's car was Donald McDermott (an indicted co-defendant, pleaded guilty during the trial.)

McDermott had previously communicated with Benjamin Williams and agreed to sell Williams a substantial amount of cocaine. This communication was known to the federal agents after Williams had agreed to cooperate. After extensive surveillance wherein the agents saw Garcia and McDermott meet another co-defendant, Roseborough, and after several telephone calls between Williams and co-defendant McDermott, the agents stopped Garcia's car and placed Garcia and McDermott under arrest. At this time, McDermott was asked to leave the car and a small amount of cocaine fell from the passenger side (McDermott's) and was immediately retrieved by the arresting agents. Petitioner Garcia remained as a driver in his car, was then asked to leave the car. A search of Garcia's person and briefcase revealed the following evidentiary items. The briefcase contained $5,900 in cash and an unloaded .357 magnum. After Garcia was taken to the DEA headquarters, $25,000 was found inside his shoes and $3,713

inside his pocket. Two days after his arrest and arraignment, $18,410 in cash was found behind a commode in a cell occupied by Garcia and McDermott and another $10,000 was found in the back seat of the DEA car which transported Garcia and McDermott.

Williams testified as a witness for the government and conceded that he did not know Garcia nor did he have any narcotic activity with Garcia. During the summation by the United States Attorney, he indicated that "Garcia failed to present any evidence." The judge immediately tried to rectify this erroneous statement but it was completely violative of the petitioner's constitutional rights and would require his court to grant a petition for certiorari.

F. REASONS FOR GRANTING WRIT

POINT I

A prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant, see *Berger* v. *U.S.*, 295 U.S. 78.

POINT II

This court has continually held that a conspiracy effectively ends with the arrest of the conspirator. There was no evidence that Garcia participated in a conspiracy or even knew anyone other than McDermott until after his arrest. To hold Garcia liable as a conspirator is contrary to what the Second Circuit decided in *U.S.* v. *Glasser*, 443 F.2d 994.

POINT III

The Second Circuit Court of Appeals stated in their decision that cash and weapons are probative of drug offenses, citing *U.S.* v. *Wiener,* 534 F.2d 15 and *U.S.* v. *Tramunti,* 513 F.2d 1087. This is contrary to the Third Circuit Court of Appeals in *U.S.* v. *Pantone,* 609 F.2d 675.

POINT IV

An inference which a jury could base its decision of guilty is constitutionally impermissible. The mere fact that a person is arrested in possession of large sums of money and a legally licensed gun effectively shifts the burden upon a defendant. This is contrary to this court's decision in *Sandstrom* v. *Montana,* 99 S.Ct. 2450. In the *Sandstrom* decision, the court quoted *In re Winship,* 397 U.S. 358, and held that the due process clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged.

POINT V

This court should grant a writ of certiorari to determine the constitutional liability of a driver when contraband is found near the passenger when the probable cause that existed was solely for the arrest of the passenger and not for the arrest of the driver. This court is again asked to define the legal requirements of "constructive possession" of narcotic drugs and to determine whether a conviction on this basis is reasonable or violates the fundamental fairness doctrine of *Twining* v. *New Jersey,* 211 U.S. 78. The Ninth Circuit Court of Appeals case in *Arellanes* v. *U.S.,* 302 F.2d 603, is in conflict with basic constitutional and permissible inferences as set forth in *Sandstrom* v. *Montana, supra.*

CONCLUSION

In conclusion the writ of certiorari should be granted and the court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals, Dated January 2, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 79-1348

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of January one thousand nine hundred and eighty.

Present:

HONORABLE IRVIN R. KAUFMAN, *Chief Judge.*

HONORABLE J. EDWARD LUMBARD,

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

———0———

UNITED STATES OF AMERICA,

Appellee,

v.

EDWIN GARCIA,

Appellant.

———0———

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix A

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. On April 19, 1979, Benjamin Williams called Donald McDermott at the suggestion of agents of the Drug Enforcement Administration to arrange to purchase one eighth of a kilogram of cocaine. Appellant Edwin Garcia drove McDermott to the site of the proposed transaction, where another vehicle owned by McDermott and containing the requested quantity of cocaine was waiting.

2. At the time of his arrest shortly thereafter, Garcia was wearing an electronic "beeper" that answered to the same telephone number as a beeper worn by McDermott and used in arranging the planned drug transaction. Garcia's briefcase, which was found in the back seat, contained $5,900 in cash, and an unloaded, licensed pistol, ammunition for which was found in the pocket of Garcia's raincoat. At the headquarters of the Drug Enforcement Agency, $25,000 in $100 bills was discovered in Garcia's shoes. Possession of weapons and large amounts of cash have been held probative of drug offenses. *United States* v. *Wiener*, 534 F.2d 15 (2d Cir.) *cert. denied*, 429 U.S. 1103 (1977); *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). The beeper and the large sums of money evidently entrusted to Garcia support the inference that Garcia was a knowing participant in the planned transaction, and therefore his conspiracy conviction under 21 U.S.C. § 846 is supported by sufficient evidence.

3. When Special Agent Panessa opened the passenger-side door of Garcia's car, a package containing 53 grams of cocaine fell to the ground. Garcia, as the driver and

registered owner of the car, had dominion and control over the car and its contents, *Arellanes* v. *United States,* 302 F.2d 603 (9th Cir. 1962); *Eason* v. *United States,* 281 F.2d 818 (9th Cir. 1969). *United States* v. *Steward,* 451 F.2d 1203 (2d Cir. 1971), involved possession imputed to the driver of an automobile where his passenger was arrested with drugs on his person after leaving the car, and is accordingly not controlling here. The jury could properly have inferred the intent to distribute required to sustain Garcia's conviction under 21 U.S.C. § 841 from his demonstrated association with the attempted sale to Williams and his associate McDermott's prior history of illicit transactions.

/s/ IRVING R. KAUFMAN,
Irving R. Kaufman,
Chief Judge.

/s/ J. EDWARD LUMBARD,
J. Edward Lumbard,

/s/ ELLSWORTH A. VAN GRAAFEILAND,
Ellsworth A. Van Graafeiland,
Circuit Judges.